

(i) Taking the sum of the value of paragraphs (e)(7), (e)(9), and (e)(11) of this section for each State.

(ii) For States qualifying under paragraph (e)(12) of this section, adding the value of paragraph (e)(12)(v) of this section.

(iii) Reducing the amount of paragraph (e)(14)(i) of this section for each State that does not qualify under paragraph (e)(12)(v) based on the proportion of each State's preliminary unreduced DSH allotment compared to the national total of preliminary unreduced DSH allotments so that the sum of paragraph (e)(14)(iii) of this section equals the sum of paragraph (e)(12)(v) of this section.

(f) *Annual DSH allotment reduction application.* For each fiscal year identified in paragraph (c) of this section, CMS will subtract the State-specific DSH allotment amount determined in paragraph (e)(14) of this section from that State's final unreduced DSH allotment. This amount is the State's final DSH allotment for the fiscal year.

■ 3. Section 447.299 is amended by adding paragraphs (c)(19), (c)(20) and (c)(21) to read as follows:

§ 447.299 Reporting requirements.

* * * * *

(c) * * *

(19) Medicaid provider number.

(20) Medicare provider number.

(21) *Total hospital cost.* The total annual costs incurred by each hospital for furnishing inpatient hospital and outpatient hospital services.

* * * * *

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

Dated: April 26, 2013.

Marilyn Tavenner,

Acting Administrator, Centers for Medicare & Medicaid Services.

Approved: May 9, 2013.

Kathleen Sebelius,

Secretary, Department of Health and Human Services.

[FR Doc. 2013-11550 Filed 5-13-13; 11:15 am]

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NATIONAL FOUNDATION ON THE ARTS AND HUMANITIES

National Endowment for the Humanities

45 CFR Part 1172

RIN 3136-AA33

Nondiscrimination on the Basis of Age in Federally Assisted Programs or Activities

AGENCY: National Endowment for the Humanities, National Foundation on the Arts and Humanities.

ACTION: Proposed rule.

SUMMARY: The National Endowment for the Humanities (NEH) is issuing Age Discrimination Act of 1975 regulations at 45 CFR part 1172. These regulations implement provisions of the Age Discrimination Act of 1975 and the general, government-wide age discrimination regulations promulgated by the United States Department of Health and Human Services (HHS).

These regulations are designed to guide the actions of recipients of Federal financial assistance from NEH and incorporate the basic standards set forth in the general, government-wide regulations for determining what constitutes age discrimination. The regulations also discuss the responsibilities of NEH recipients and the investigations, conciliation, and enforcement procedures NEH has been using and will continue to use to ensure compliance with the Act.

DATES: Written comments must be postmarked and electronic comments must be submitted on or before July 15, 2013.

ADDRESSES: You may submit comments by any of the following methods: email to gencounsel@neh.gov; fax to 202-606-8600, please send your comments to the attention of Gina Raimond; or postal mail to Gina Raimond, Attorney Advisor, Office of the General Counsel, National Endowment for the Humanities, 1100 Pennsylvania Ave. NW., Room 529, Washington, DC 20506. To ensure proper handling, please reference "Age Discrimination Act Regulations" on your correspondence.

FOR FURTHER INFORMATION CONTACT: Gina Raimond, Office of the General Counsel, National Endowment for the Humanities, 202-606-8322 (voice) or 202-606-8282 (TDD).

SUPPLEMENTARY INFORMATION:

Background Information

The Age Discrimination Act of 1975, as amended, 29 U.S.C. 6101, *et seq.*, (the

"Act"), prohibits discrimination on the basis of age in programs or activities receiving Federal financial assistance. The Act, which applies to persons of all ages, also contains certain exceptions that permit, under limited circumstances, use of age distinctions or factors other than age that may have a disproportionate effect on the basis of age.

The Act required the former Department of Health, Education and Welfare (HEW) to issue general, government-wide regulations setting standards to be followed by all Federal agencies implementing the Act. These government-wide regulations, issued on June 12, 1979 and codified at 45 CFR part 90, require each agency to publish agency-specific regulations implementing the Act and to submit such final agency regulations to HEW (now HHS) before publication in the **Federal Register** (see 45 CFR part 90.31). The Act became effective on July 1, 1979—the effective date of HEW's final government-wide regulations—and NEH has enforced the provisions of the Act since that time. NEH first proposed agency-specific regulations implementing the Act on October 4, 1979 (44 FR 57130), which were closely based on the general, government-wide regulations. NEH's original proposed rule adopted many substantively identical sections and cross-referenced sections from the government-wide regulations, rather than repeating them in full. HHS reviewed and approved NEH's initial agency-specific regulations in 1985; however, NEH did not publish the final regulations.

Since such a significant amount of time has passed since NEH initially drafted the proposed rule, and because regulatory development guidelines have changed over the years, NEH determined that it would be best to begin the regulatory process anew by drafting new agency-specific age discrimination regulations. As a practical matter, however, the absence of agency-specific regulations has not affected NEH's enforcement of prohibitions against discrimination on the basis of age in programs or activities receiving financial assistance from NEH. Further, NEH has consistently fulfilled its obligation to report annually to Congress through HHS on its compliance and enforcement activities.

Overview of Proposed Rule

NEH has designed this proposed rule to fulfill the agency's statutory and regulatory obligations to issue a regulation implementing the Act that conforms to the government-wide regulations at 45 CFR part 90.

NEH's proposed regulations are divided into four parts: Subpart A—General; Subpart B Standards for Determining Age Discrimination; Subpart C—Responsibilities of NEH Recipients; and Subpart D—Investigation, Conciliation, and Enforcement Procedures.

Subpart A—General

Subpart A explains the purpose of NEH's age discrimination regulations, which is to set out NEH's policies and procedures in accordance with the Act and the government-wide regulations. The regulations apply to any program or activity receiving Federal financial assistance from NEH. Subpart A also defines terms used in the regulations, many of which are identical to the definitions in the government-wide regulations. The definition of the term "recipient" points out the inapplicability of these regulations to assistance programs administered directly by the Federal government to beneficiaries. With respect to direct assistance programs, the regulations may apply whenever direct aid is provided to an individual on conditions that the aid is spent in providing services or benefits to others. Further, because the Act contains several exceptions which limit the general prohibition against age discrimination, the regulations provide definitions for two terms that are essential to understanding two of those exceptions: "normal operation" and "statutory objective."

Subpart B—Standards for Determining Age Discrimination

Subpart B sets out the standards NEH uses for determining illegal age discrimination, which are based on the government-wide regulations. The regulations also establish a four-part test for a specific age distinction to satisfy the "normal operation" or "statutory objective" requirement for a recipient to use an age-based distinction in a program or activity receiving Federal financial assistance. NEH will use this four-part test to scrutinize age distinctions, if any, which are imposed in NEH-assisted programs, but which are not explicitly authorized by a Federal, State or local statute. NEH recipients are also permitted to take an action otherwise prohibited by the Act if the action is based on "reasonable factors other than age," but only if the factor bears a direct and substantial relationship to the program's normal operation or to the achievement of a statutory objective.

Subpart C—Responsibilities of NEH Recipients

Subpart C sets forth the duties of NEH recipients. NEH recipients are responsible for ensuring that their programs and activities are in compliance with the Act and NEH regulations. Where an NEH recipient passes on financial assistance to subrecipients, the recipient must notify subrecipients of their obligations under the regulations. Under these regulations, NEH could require a recipient or subrecipient to complete a written self-evaluation of its compliance with the Act and these regulations. The self-evaluation must be kept on file for three years from its effective date and made available to the public upon request.

Subpart D—Investigation, Conciliation, and Enforcement Procedures

Subpart D establishes the procedures for investigation, conciliation, and enforcement of the Act, and closely follows the procedural requirements included in the government-wide age discrimination regulations. Mediation is the first step in the complaint process. NEH will refer all complaints of discrimination under the Act to the Federal agency designated by HHS to manage the mediation process. Complainants and NEH recipients must participate in the effort to reach a mutually satisfactory settlement. Mediation may last no more than sixty (60) days from the date NEH first receives the complaint. NEH will investigate any complaints that are unresolved after mediation or are reopened because the settlement agreement is violated. Finally, the regulations permit NEH to withhold funds and disburse them to an appropriate alternate recipient, if the alternate has demonstrated the ability to comply with the regulations and to achieve the goals of the National Foundation on the Arts and the Humanities Act of 1965.

Regulatory Procedures

Executive Order 12866, Regulatory Review

NEH has determined that the proposed rule is not a "significant regulatory action" under Executive Order 12866 because it will not: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken

or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866. Therefore, the proposed rule is not subject to Office of Management and Budget (OMB) review.

Regulatory Flexibility Act

In accordance with section 605(b) of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601, *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996), the Chairman of NEH certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities. In making this determination, NEH used the definition of *small entity* set forth in the RFA: (1) A small business, as defined by the Small Business Administration (SBA) in 13 CFR part 121.201; (2) a small governmental jurisdiction, which is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization, which is any non-profit enterprise that is independently owned and operated and is not dominant in its field. Some NEH grant programs support humanities projects developed by small, independently-owned non-profits, such as museums, libraries, and other cultural organizations. NEH funds approximately 75–100 small non-profits each year, which accounts for less than ten percent of NEH's annual funding.

However, the proposed rule, if promulgated in final form, will not impose any additional requirements on these small entities because it will not substantively change existing requirements, but will merely clarify such duties for entities receiving financial assistance from NEH. The requirements prohibiting age discrimination by recipients of Federal financial assistance contained in the Act and the government-wide regulations have been in effect since 1979. The proposed rule only formalizes those existing requirements for NEH recipients.

Small Business Regulatory Enforcement Fairness Act of 1996

NEH has determined that the proposed rule is not a "major rule" as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), as amended, Public Law 104–121 (5 U.S.C. 804). This rule will not result in: (1) An

annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation or the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4 (2 U.S.C. 1501, *et seq.*), does not apply to the proposed rule because it does not apply to regulatory actions that establish or enforce statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap or disability. Further, the proposed rule contains no “Federal mandate” under Title II of UMRA because UMRA excludes from the definitions of “Federal intergovernmental mandate” and “Federal private sector mandate” duties that arise from conditions of Federal assistance and duties that arise from participation in a voluntary Federal program. Congress mandated in the Act the establishment of these agency-specific regulations to enforce the prohibition of discrimination on the basis of age in programs or activities receiving Federal financial assistance. These regulations do not apply to any program or activity unless it applies for and receives financial assistance from NEH. Application for, and receipt of, NEH assistance is entirely voluntary. In addition, NEH has determined that the proposed rule will not significantly or uniquely affect small governments. These regulations apply uniformly to all organizational recipients of NEH financial assistance.

Paperwork Reduction Act

NEH has determined that the Paperwork Reduction Act (PRA), 44 U.S.C. 3501, *et seq.*, does not apply because the proposed rule does not impose any new information collection requirements that require OMB approval. Section 3518(c)(1)(B) of the PRA exempts from OMB approval, collections of information “during the conduct of . . . (ii) an administrative action or investigation involving an agency against specific individuals or entities.” These regulations provide NEH with discretionary authority to require information from recipients as part of an investigation, thereby eliminating any PRA concerns, because it is discretionary and tied to NEH’s

authority to investigate. Further, the proposed rule provides that individuals “may file” complaints and requires that recipients provide notice to subrecipients of their obligations under the Act and the regulations, neither of which involve a “collection of information” under the PRA.

List of Subjects in 45 CFR Part 1172

Administrative practice and procedure, Age discrimination, Civil rights, Grant programs, Reporting and recordkeeping requirements.

Dated: May 1, 2013.

Michael P. McDonald,
General Counsel.

For the reasons stated in the preamble, NEH proposes to amend 45 CFR Subchapter D by adding part 1172 as follows:

PART 1172—NONDISCRIMINATION ON THE BASIS OF AGE IN FEDERALLY ASSISTED PROGRAMS OR ACTIVITIES

Subpart A—General

Sec.

- 1172.1 Purpose.
- 1172.2 Application.
- 1172.3 Definitions.

Subpart B—Standards for Determining Age Discrimination

- 1172.11 Rules against age discrimination.
- 1172.12 Exceptions to the rules against age discrimination.
- 1172.13 Burden of proof.

Subpart C—Responsibilities of NEH Recipients

- 1172.21 General responsibilities.
- 1172.22 Notice to subrecipients.
- 1172.23 Self-evaluation.
- 1172.24 Information requirements.

Subpart D—Investigation, Conciliation, and Enforcement Procedures

- 1172.31 Compliance reviews.
- 1172.32 Complaints.
- 1172.33 Mediation.
- 1172.34 Investigation.
- 1172.35 Prohibition against intimidation or retaliation.
- 1172.36 Compliance procedure.
- 1172.37 Hearings, decisions, post-termination proceedings.
- 1172.38 Remedial action by recipients.
- 1172.39 Alternate funds disbursement procedure.
- 1172.40 Exhaustion of administrative remedies.

Authority: 42 U.S.C. 6101–6107; 45 CFR 90.

Subpart A—General

§ 1172.1 Purpose.

The purpose of this part is to implement the Age Discrimination Act of 1975, and as required by the general,

government-wide age discrimination regulations at 45 CFR part 90. The Act is designed to prohibit discrimination on the basis of age in programs or activities receiving Federal financial assistance. The Act also permits federally assisted programs or activities, and recipients of Federal funds, to continue to use certain age distinctions and factors other than age which meet the requirements of the Act and these regulations.

§ 1172.2 Application.

(a) The Act and the regulations in this part apply to any program or activity receiving financial assistance from the National Endowment for the Humanities (NEH).

(b) The Act does not apply to:

(1) Any age distinction contained in that part of a Federal, State or local statute or ordinance adopted by an elected, general purpose legislative body which:

(i) Provides any benefits or assistance to persons based on age;

(ii) Established criteria for participation in age-related terms; or

(iii) Described intended beneficiaries or target groups in age-related terms.

(2) Any employment practice of any employer, employment agency, labor organization, or any labor-management joint apprenticeship training program, except for any program or activity receiving Federal financial assistance for public service employment under the Workforce Investment Act of 1998 (29 U.S.C. 2801, *et seq.*).

§ 1172.3 Definitions.

As used in these regulations, the term: *Act* means the Age Discrimination Act of 1975, as amended, 42 U.S.C. 6101, *et seq.* (Title III of Pub. L. 94–135).

Action means any act, activity, policy, rule, standard, or method of administration; or the use of any policy, rule, standard, or method of administration.

Age means how old a person is, or the number of elapsed years from the date of a person’s birth.

Age distinction means any action using age or an age-related term.

Age-related term means a word or words which necessarily imply a particular age or range of ages (for example, *children, adult, older persons*, but not *student*).

Agency means a Federal department or agency that is empowered to extend financial assistance.

Chairman means the Chairman of the National Endowment for the Humanities.

Federal financial assistance means any grant, entitlement, loan, cooperative

agreement, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which NEH provides or otherwise makes available assistance in the form of:

- (1) Funds;
- (2) Services of Federal personnel; or
- (3) Real and personal property or any interest in or use of property, including:
 - (i) Transfers or leases of property for less than fair market value or for reduced consideration; and
 - (ii) Proceeds from a subsequent transfer or lease of property if the Federal share of its fair market value is not returned to the Federal Government.

Normal operation means the operation of a program or activity without significant changes that would impair its ability to meet its objectives.

Program or activity means all of the operations of:

- (1)(i) A department, agency, special purpose district, or other instrumentality of a State or local government, or
- (ii) The entity of such State or local government that distributes Federal financial assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;
- (2)(i) A college, university, or other postsecondary institution, or a public system of higher education, or
- (ii) A local educational agency (as defined in 20 U.S.C. 7801), system of vocational education, or other school system;

- (3)(i) An entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole, or

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

- (ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) Any other entity which is established by two or more of the entities described in paragraph (a), (b), or (c) of this definition, any part of which is extended Federal financial assistance.

Recipient means any State or its political subdivision, any

instrumentality of a State or its political sub-division, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended, directly or through another recipient. Recipient includes any successor, assignee, or transferee, but excludes the ultimate beneficiary of the assistance.

Secretary means the Secretary of the Department of Health and Human Services.

Statutory objective means any purpose of a program or activity expressly stated in any Federal statute, State statute, or local statute or ordinance adopted by an elected, general purpose legislative body.

Subrecipient means any of the entities in the definition of recipient to which a recipient extends or passed on Federal financial assistance. A subrecipient is generally regarded as a recipient of Federal financial assistance and has all the duties of a recipient in these regulations.

United States means the fifty states, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, the Trust Territory of the Pacific Islands, the Northern Marianas, and the territories and possessions of the United States.

Subpart B—Standards for Determining Age Discrimination

§ 1172.11 Rules against age discrimination.

The rules stated in this section are limited by the exceptions contained in § 1172.12.

(a) *General rule:* No person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.

(b) *Specific rules:* A recipient may not, in any program or activity receiving Federal financial assistance, directly or through contractual, licensing, or other arrangements use age distinctions or take any other actions which have the effect, on the basis of age, of:

- (1) Excluding individuals from, denying them the benefits of, or subjecting them to discrimination under, a program or activity receiving Federal financial assistance, or
- (2) Denying or limiting individuals in their opportunity to participate in any program or activity receiving Federal financial assistance.

(c) The specific forms of age discrimination listed in paragraph (b) of this section do not necessarily constitute a complete list of discriminatory actions.

§ 1172.12 Exceptions to the rules against age discrimination.

(a) *Normal operation or statutory objective of any program or activity.* A recipient may take an action otherwise prohibited by § 1172.11 if the action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity, if:

- (1) Age is used as a measure or approximation of one or more other characteristics;
- (2) The other characteristic(s) must be measured or approximated in order for the normal operation of the program or activity to continue, or to achieve any statutory objective of the program or activity;

(3) The other characteristic(s) can be reasonably measured or approximated by the use of age; and

(4) The other characteristic(s) are impractical to measure directly on an individual basis.

(b) *Reasonable factors other than age.*

A recipient may take an action otherwise prohibited by § 1172.11 which is based on a factor other than age, even though that action may have a disproportionate effect on persons of different ages. An action may be based on a factor other than age only if the factor bears a direct and substantial relationship to the normal operation of the program or activity or to the achievement of a statutory objective.

(c) *Affirmative action by recipient.* Even in the absence of a finding of discrimination, a recipient may take affirmative action to overcome the effects or conditions that resulted in limited participation in the recipient's program or activity on the basis of age.

(d) *Special benefits for children and the elderly.* If a recipient operating a program or activity provides special benefits to the elderly or to children, such use of age distinctions shall be presumed to be necessary to the normal operation of the program or activity, notwithstanding the provisions of § 1172.11.

§ 1172.13 Burden of proof.

The recipient of Federal financial assistance bears the burden of proving that an age distinction or other action falls within the exceptions outlined in § 1172.12.

Subpart C—Responsibilities of NEH recipients

§ 1172.21 General responsibilities.

A recipient has responsibility to ensure that its programs or activities are in compliance with the Act and these regulations and to take steps to

eliminate violations of the Act and these regulations. A recipient also has responsibility to maintain records, provide information, and to afford NEH access to its records to the extent NEH finds necessary to determine whether the recipient is in compliance with the Act and these regulations.

§ 1172.22 Notice to subrecipients.

Where a recipient passes on Federal financial assistance from NEH to subrecipients, the recipient must provide the subrecipients with written notice of their obligations under the Act and these regulations. Each recipient must also make necessary information available to its beneficiaries in order to inform them about the protections against discrimination provided by the Act and these regulations.

§ 1172.23 Self-evaluation.

As part of a compliance review under § 1172.31 or a complaint investigation under § 1172.34, NEH may require a recipient employing the equivalent of fifteen (15) or more full time employees to complete a written self-evaluation, in a manner specified by NEH, of any age distinction imposed in its program or activity receiving Federal financial assistance. A recipient must take corrective and remedial action whenever a self-evaluation indicates a violation of the Act, and the recipient must make the self-evaluation available upon request to NEH and to the public for a period of three (3) years following its completion.

§ 1172.24 Information requirements.

Each recipient must keep records containing information necessary to determine whether the recipient is in compliance with the Act and these regulations, and must make them available to NEH upon request. Each recipient must also permit reasonable access by NEH to its books, records, accounts, and other facilities and sources of information, to the extent necessary for NEH to determine whether the recipient is in compliance with the Act and this part.

Subpart D—Investigation, Conciliation, and Enforcement Procedures

§ 1172.31 Compliance reviews.

(a) NEH may conduct compliance reviews, pre-award reviews, and other similar procedures in order to investigate and correct violations of the Act and these regulations. NEH may conduct these reviews even in absence of a complaint against the recipient. Reviews may be as comprehensive as necessary to determine whether a

recipient is in compliance with the Act and this part.

(b) If a compliance review or pre-award review indicates a violation of the Act and these regulations, NEH will attempt to contact the recipient and achieve the recipient's voluntary compliance with the Act. If the recipient does not comply voluntarily, NEH may pursue enforcement efforts as described in § 1172.36.

§ 1172.32 Complaints.

(a) Any person, individually or as a member of a class or on behalf of others, may file a complaint with NEH, alleging discrimination prohibited by the Act and the regulations in this part based on an action occurring on or after July 1, 1979. A complainant must file a complaint in writing within 180 days from the date that the complainant first had knowledge of the alleged act of discrimination. However, for good cause, NEH may extend this time limit. NEH will consider the date a complaint is filed as the date when the complaint is sufficient to be processed.

(b) Complaints must include a written and signed statement identifying the parties involved, describing the alleged violation, and stating the date on which the complainant first had knowledge of the alleged violation.

(c) NEH will attempt to facilitate the filing of complaints wherever possible, including taking the following measures, as appropriate:

(1) Widely disseminating information regarding the obligations of recipients under the Act and this part,

(2) Permitting a complainant to add information to the complaint to meet the requirements of a sufficient complaint,

(3) Notifying the complainant and the recipient (or their representatives) of their rights and obligations under the complaint procedure, including the right to have a representative at all stages of the complaint procedure, and/or

(4) Notifying the complainant and the recipient (or their representatives) of their right to contact NEH for information and assistance regarding the complaint resolution process.

(d) NEH will return any complaint that is unsigned or that is not within NEH's jurisdiction for any other reason, and NEH will provide an explanation for the return.

§ 1172.33 Mediation.

(a) *Referral of complaints for mediation.* NEH will promptly refer all complaints that fall within the jurisdiction of these regulations, and that contain all information necessary for further processing, to the agency

designated by the Secretary to manage the mediation process.

(b) Both the complainant and the recipient must participate in the mediation process to the extent necessary to reach an agreement, or for the mediator to make an informal judgment that an agreement is impossible. The complainant and recipient must meet with the mediator at least once before NEH will accept a judgment that an agreement is impossible. However, the recipient and the complainant need not meet with the mediator at the same time.

(c) If the complainant and recipient reach a mutually satisfactory resolution of the complaint during the mediation period, they must prepare an agreement in writing. The mediator will send a copy of the settlement agreement to NEH. NEH will take no further action based on that complaint unless it appears that the complainant or the recipient has failed to comply with the agreement.

(d) The mediator will protect the confidentiality of all information obtained in the course of the mediation process, and no mediator shall testify in any adjudicative proceeding, produce any document, or otherwise disclose any information obtained in the course of the mediation process without prior approval of the head of the mediation agency.

(e) If the complainant and recipient do not reach a mutually satisfactory resolution during mediation within sixty (60) days after NEH receives the complaint, the mediator must return the complaint to NEH for investigation. The mediator may return a complaint at any time before the end of the sixty-day period if it appears that the complaint cannot be resolved through mediation. The mediator may extend this sixty-day period, provided NEH concurs, for not more than thirty (30) days, if the mediator determines that resolution is likely to occur within such period.

§ 1172.34 Investigation.

(a) *Informal investigation.* (1) NEH will investigate complaints that are unresolved after mediation or are reopened because of a violation of a settlement agreement.

(i) As part of this initial investigation, NEH will use informal fact-finding methods, including joint or separate discussions with the complainant and the recipient to establish the facts, and, if possible, resolve the complaint to the mutual satisfaction of the parties. NEH may seek the assistance of any involved State agency.

(ii) NEH will put any settlement agreement in writing and have it signed

by the parties and NEH. The settlement is not a finding of discrimination against a recipient.

(2) The settlement shall not affect the operation of any other enforcement effort of NEH, including compliance reviews and investigation of other complaints which may involve the recipient.

(b) *Formal investigation.* If NEH cannot resolve the complaint through informal investigation, it will develop formal findings through further investigation of the complaint. If the formal investigation indicates a violation of the Act or these regulations, NEH will attempt to obtain voluntary compliance. If NEH cannot obtain voluntary compliance, it will arrange for enforcement as described in § 1172.36.

§ 1172.35 Prohibition against intimidation or retaliation.

A recipient may not engage in acts of intimidation or retaliation against any person who attempts to assert a right protected by the Act or this part, or cooperates in any mediation, investigation, hearing, or other part of NEH's investigation, conciliation, and enforcement process.

§ 1172.36 Compliance procedure.

(a) NEH may enforce the Act and the regulations in this part through:

(1) Termination of a recipient's Federal financial assistance under the program or activity involved where the recipient has violated the Act or these regulations. A recipient must have the opportunity for a hearing on record before an administrative law judge, who must determine that a violation has occurred. The determination of the recipient's violation may be made only after a recipient has had an opportunity for a hearing on the record before an administrative law judge. Therefore, NEH will not terminate a recipient's Federal financial assistance in a case that has been settled in mediation, or prior to a hearing, unless the case is reopened because of a violation of the settlement agreement.

(2) Any other means authorized by law, including but not limited to:

(i) Referral to the Department of Justice for proceedings to enforce any rights of the United States or obligations of the recipient created by the Act or these regulations.

(ii) Use of any requirement of or referral to any Federal, State, or local government agency that will have the effect of correcting a violation of the Act or this part.

(b) NEH will limit any termination under § 1172.36(a)(1) to the particular recipient and particular program or

activity, or portion thereof, that NEH finds in violation of the Act or these regulations. NEH will not base its decision to terminate on any other program or activity of the recipient that does not receive Federal financial assistance from NEH.

(c) NEH will not take action under § 1172.36(a) until:

(1) The Chairman has advised the recipient of its failure to comply with the Act or these regulations, and that NEH has determined that voluntary compliance cannot be obtained, and

(2) Thirty (30) days have elapsed after the Chairman has sent a written report of the circumstances and grounds of the action to the Congressional Committee(s) having legislative jurisdiction over the program or activity involved. The Chairman will file such report whenever it takes action under § 1172.36(a).

(d) NEH also may defer granting new Federal financial assistance to a recipient when a hearing under § 1172.36(a)(1) is initiated.

(1) New Federal financial assistance includes all assistance for which NEH requires an application or approval, including renewal or continuation of existing activities, or authorization of new activities, during the deferral period. New Federal financial assistance does not include assistance approved prior to the beginning of a termination hearing under § 1172.36(a)(1), or increases in funding as a result of changed computation of formula awards.

(2) NEH will not begin a deferral until the recipient has received a notice of an opportunity for a hearing under § 1172.36(a)(1). NEH will not continue a deferral for more than sixty (60) days unless a hearing has begun within that time, or the time for beginning the hearing has been extended by mutual written consent of the recipient and NEH. NEH will not continue a deferral for more than thirty (30) days after the close of the hearing, unless the hearing results in a finding against the recipient. If the hearing results in a finding against the recipient, NEH must terminate funds.

§ 1172.37 Hearings, decisions, post-termination proceedings.

Certain NEH procedural provisions applicable to Title VI of the Civil Rights Act of 1964 apply to NEH enforcement of these regulations. They are found at 45 CFR 1110.9 through 1110.11.

§ 1172.38 Remedial action by recipients.

Where NEH finds a recipient has discriminated on the basis of age, the recipient shall take any remedial action

that NEH may require to overcome the effects of discrimination. If another recipient exercises control over the recipient that has discriminated, NEH may require both recipients to take remedial action.

§ 1172.39 Alternate funds disbursement procedure.

When NEH withholds funds from a recipient under these regulations, the Chairman may disburse the withheld funds directly to an alternate recipient otherwise eligible for NEH support. NEH will require any alternate recipient to demonstrate the ability to comply with these regulations and to achieve the goals of the National Foundation on the Arts and the Humanities Act of 1965, Public Law 89-209 (20 U.S.C. 951)—the Federal statute authorizing the Federal financial assistance.

§ 1172.40 Exhaustion of administrative remedies.

(a) A complainant may file a civil action under the Act and these regulations following the exhaustion of administrative remedies. Administrative remedies are exhausted if 180 days have elapsed since the complainant filed the complaint and NEH has made no finding with regard to the complaint, or NEH issues any finding in favor of the recipient.

(b) If either of the conditions set forth in § 1172.40(a) is satisfied, NEH will:

(1) Promptly advise the complainant of this fact,

(2) Advise the complainant of his or her right, under section 305(e) of the Act, to bring a civil action for injunctive relief that will effect the purposes of the Act, and

(3) Inform the complainant:

(i) That a civil action can only be brought in a United States district court for the district in which the recipient is found or transacts business,

(ii) That a complainant prevailing in a civil action has the right to be awarded the costs of the action, including reasonable attorney's fees, but that these costs must be demanded in the complaint,

(iii) That before commencing the action, the complainant must give thirty (30) days' notice by registered mail to the Secretary, the Attorney General of the United States, the Chairman, and the recipient,

(iv) That the notice must state the alleged violation of the Act, the relief requested, the court in which the action will be brought, and whether or not attorney's fees are demanded in the event the complainant prevails, and

(v) That no action may be brought if the same alleged violation of the Act by

the same recipient is the subject of a

pending action in any court of the United States.

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